

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re: :
W.R. GRACE & CO., *et al.*, : Chapter 11
Debtors. : Case No. 01-1139 (JKF)
: Jointly Administered
: Related Doc. No. 21544

**FEDERAL INSURANCE COMPANY'S PRETRIAL SUBMISSION OF
ISSUES FOR PHASE II OF THE CONFIRMATION HEARING**

Pursuant to the Court's July 7, 2009 Order Regarding Phase II Pretrial Proceedings, Federal Insurance Company ("Federal"), by and through its counsel, hereby submits the following narrative of issues Federal intends to raise at trial, and the evidence it intends to use in support of its objections. As provided in the Court's July 7, 2009 Order, Federal reserves the right to submit a supplemental Pretrial Submission in the event that matters raised in the Plan Proponents' Trial brief have not been previously addressed in this Pretrial Submission.

1. ISSUES TO BE RAISED

Federal expects to raise the following issues, which were set forth in detail in Federal's Phase I objections and trial brief:¹

- a) Whether the Plan should not be confirmed because it abrogates the anti-assignment provisions in Federal's policies.
- b) Whether the Plan improperly abrogates Federal's right to pursue contribution and/or indemnity rights.
- c) Whether the Plan improperly limits section 524(g) protection to specified parts of settled policies and to insurers who settle before the end of the Confirmation

¹ During the Phase I Pretrial Conference on June 18, 2009, the Court advised that several of Federal's Phase I objections, which the parties briefed in full, would be addressed in Phase II of the trial confirmation proceedings.

Hearing, rather than being structured so as to provide insurers who settle either pre- or post-Confirmation the broadest possible protection available under section 524(g).

- d) Whether the Plan improperly fails to provide Federal with section 524(g) injunctive protection from claims for which the Debtors would be obligated to indemnify Federal under their November 18, 1997 Settlement Agreement.
- e) Whether the Plan is unconfirmable because members of the Asbestos PI Trust Advisory Committee (“TAC”) have conflicts of interest that violate Delaware law and the pertinent rules of professional conduct, or that otherwise disqualify them from being TAC members.

2. FEDERAL’S EVIDENCE

A. Witnesses

- a) James B. Shein, Clinical Professor of Management & Strategy, Kellogg School of Management – Northwestern University (expert witness). Professor Shein is an expert on good corporate governance and Trust practices. He is expected to testify that the structure of the Asbestos PI Trust – and in particular the appointment as members of the TAC of personal injury lawyers who will be representing claimants making claims on the Trust – creates a potential for abuse and for the Trustees and TAC to act contrary to the governing principle in the Trust Agreement that all claimants be treated fairly and equitably in connection with claims made against the Trust and that the Trust not deplete its assets by paying undeserving claims. Professor Shein’s opinions are more fully set forth in his expert report submitted in this case and his deposition testimony.

- b) George L. Priest, Professor of Law and Economics, Yale Law School (expert witness). Professor Priest is an expert in the economics of insurance. Professor Priest is expected to testify concerning the economic underpinnings of assignment clauses in insurance policies and the economic effects of the purported assignment of Federal's policies to the Asbestos PI Trust.
- c) Peter Van N. Lockwood, Member, Caplin & Drysdale, Chartered, One Thomas Circle N.W., Suite 1100, Washington, D.C. 20005 (Asbestos PI Committee's Rule 30(b)(6) designee on all topics) (by Deposition). Federal expects to introduce portions of the deposition testimony of Peter Lockwood regarding the ACC and FCR's involvement in the drafting of the Asbestos PI Trust Agreement and the TDP, the selection of the Trustees and the members of the TAC, and the representation by members of the TAC of claimants to the Asbestos PI Trust pursuant to contingency fee arrangements. Federal may also introduce Mr. Lockwood's deposition testimony regarding the scope of the Plan's 524(g) injunction and whether the Plan potentially subjects Indirect PI Trust Claims to disallowance under section 502(e).
- d) All witnesses designated by any other party.
- e) Any witnesses necessary for impeachment or rebuttal.

B. Exhibits

Federal intends to rely on the Plan, the Plan Proponents responses to Federal's written discovery in this matter, Federal's insurance policies, as well as those to which it follows form, and its settlement agreement with Grace, all of which were moved into the record during the Phase I Hearing.

3. JOINDER IN OTHER INSURERS' PRETRIAL SUBMISSIONS

To the extent applicable and not listed above, Federal joins in the Pretrial Submissions of all other insurers.

Dated: July 20, 2009

Respectfully submitted,

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